

Internal Revenue Service

memorandum

CC:TL-N-5205-88
Br1:CEButterfield

date: APR 21 1988

to: District Counsel, San Jose CC:SJ

from: Director, Tax Litigation Division CC:TL

subject: [REDACTED]

This is in response to your request for technical advice dated April 4, 1988. You have already received informal technical advice in this case from Mr. Calder Robinson of this office.

ISSUE

Whether petitioner could be awarded fees for [REDACTED] hours of attorney time (approximately \$[REDACTED]) in settlement of the above-captioned case. 7430-0000.

CONCLUSION

Petitioner should be awarded her fees and costs.

FACTS

Petitioner was married to [REDACTED] during [REDACTED] and [REDACTED]. They separated in [REDACTED], and were divorced in [REDACTED]. Petitioner filed a separate return for [REDACTED]. [REDACTED] without knowledge of the petitioner, filed a request for tentative refund for [REDACTED], based on a net operating loss. A signature appeared on the spouse's signature line on the form 1045 (apparently the signature of [REDACTED]'s then wife, [REDACTED], not [REDACTED]). A statutory notice of deficiency was sent to petitioner and [REDACTED] based on the disallowance of the NOL. This notice was dated [REDACTED]. Petitioner never extended the statute of limitations for her [REDACTED] year, although [REDACTED] apparently did so. On [REDACTED], the petition was filed, alleging, among other things, that the statutory notice was barred by the statute of limitations.

Due to difficulties in obtaining either petitioner's administrative file or that of [REDACTED] two motions for extension of time to answer had to be requested. The second was

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the subject of an objection by petitioner, and the motion was calendared for hearing on [REDACTED]. On [REDACTED], District Counsel received the files, and the case was conceded at the hearing.

LEGAL ANALYSIS

Section 7430 allows the court to award fees and costs to successful petitioners in civil actions under the Code. Petitioners must first exhaust the administrative remedies available within the Service. Here petitioner apparently did so. See Treas. Reg. §§ 301.7430-1, 301.7430-1(f)(2). In order to be eligible for an award of fees, in cases commenced after December 31, 1985, petitioner must show that the government's position was not substantially justified, and that they substantially prevailed. There is no question in this case about the latter requirement -- the case was conceded immediately upon receipt of the files. As to the former, that the Government's position is not substantially justified, the Tax Court has held that the position of the Government will be the position taken in litigation, after the petition is filed (or when District Counsel first became involved, if earlier). Sher v. Commissioner, 89 T.C. 79 (1987). We do not believe that the Government could be held to have fallen below this standard where its actions were limited to obtaining the necessary information, and promptly thereafter conceding the case.

The fact remains, however, that due to delays in obtaining the files, the case was not conceded until six months after the petition was filed. The court has found that on some occasions, where concession is unreasonably delayed, an award of fees may be made for the portion of costs incurred because of the delay. Stieha v. Commissioner, 89 T.C. No. 55 (October 8, 1987). The court has so far been fairly generous in deciding how much time is reasonable for a concession. The underlying administrative position in this case, however, might incline the court's sympathy to the petitioner. Therefore in litigating we would run the risk that the court would find a concession even one day after receipt of the files to be unreasonably delayed. Such an opinion is clearly to be avoided. Moreover, as you point out, the Ninth Circuit has recently held in Sliwa v. Commissioner, 839 F.2d 602 (9th Cir. 1988), that the government's position will be judged by the underlying administrative activity leading to the presence of the taxpayer in court, as well as by subsequent activity in litigation. The court in Sliwa, at note 6, strongly indicates that they would reach the same result

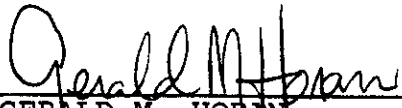
under section 7430 as amended by the Tax Reform Act of 1986. We would not want this case to provide them with an opportunity to do that.

Therefore, we concur in your recommendation that petitioner be awarded her fees in settlement of this case. We have attached an award data sheet, which should be submitted to us with the final decision document, so that we can request payment from the General Accounting Office.

If we may be of further assistance with regard to this matter, please do not hesitate to call Ms. Clare E. Butterfield, at (FTS) 566-3442.

MARLENE GROSS

By:


GERALD M. HORAN
Senior Technician Reviewer
Branch No. 1
Tax Litigation Division

Attachment:
As stated